

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) FINAL ORDER
NO. 57517-g76L BY LLOYD A. AND)
MARY C. TWITE)

* * * * *

The time period for filing exceptions, objections, or comments to the Amended Proposal for Decision in this matter has expired. No timely written exceptions were received. Therefore, having given the matter full consideration, the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the January 20, 1989 Amended Proposal for Decision, and incorporates them herein by reference.

WHEREFORE, based upon the record herein, the Department makes the following:

ORDER

Application for Beneficial Water Use Permit No. 57517-g76L by Lloyd A. and Mary C. Twite hereby is denied without prejudice.

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a

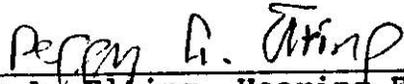
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petition in the appropriate court within 30 days after service of the Final Order.

Dated this 21 day of March, 1989.



Gary Fritz, Administrator
Department of Natural
Resources and Conservation
Water Resources Division
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6605



Peggy A. Elting, Hearing Examiner
Department of Natural Resources
and Conservation
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6612

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was duly served upon all parties of record at their address or addresses this 21st day of March, 1989, as follows:

Lloyd and Mary Twite
3000 Eldora
Missoula, Montana 59803

Lando R. Bras
P.O. Box 3
Lonepine, Montana 59848

John D. Malinak
Route 3
Hot Springs, Montana 59845

Clayton and Gail White
Route 3, Box 399
Hot Springs, Montana 59845

Chuck Brasen, Field Manager
3220 Highway 93 South
P.O. Box 860
Kalispell, MT 59903-0860

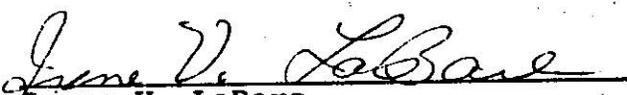
Leon Perrin
Route 3, Box 395
Hot Springs, Montana 59845

Douglas and Diane Page
Route 2
Hot Springs, Montana 59845

Leonard Kaufman
Murray, Kaufman, Vidal
and Gordon, P.C.
P.O. Box 728
Kalispell, Montana 59903

Bill Christensen
P.O. Box 640
Hot Springs, Montana 59845

Mark Shapley, Hydrogeologist
Department of Natural
Resources and Conservation
1520 East 6th Avenue
Helena, Montana 59620



Irene V. LaBare
Legal Secretary

head

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) AMENDED PROPOSAL
NO. 57517-g76L BY LLOYD A. AND) FOR DECISION
MARY C. TWITE)

* * * * *

In response to the December 5, 1988 Order requiring the Applicants to submit the written records which they were required to keep pursuant to the conditions of the Interim Permit issued in this matter, the Applicants notified the Hearing Examiner that they have not drilled the well for which the Interim Permit was granted.

Based on the absence of any data to review, and the Department's resultant inability to determine if water is available for the Applicants' proposed project or if the proposed use would result in adverse effect to other appropriators, the Hearing Examiner hereby issues an Amended Proposal for Decision in this matter.

The Hearing Examiner adopts the Findings of Fact contained in the November 14, 1986 Proposal for Decision and incorporates them herein by reference, along with the additional Findings of Fact specified in this Amended Proposal for Decision. The Hearing Examiner also adopts and incorporates Conclusions of Law 1 through 4 and 6 through 9, while amending Conclusions of Law 5

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and 10, and deleting Conclusions 11 through 13, as specified in this Amended Proposal. The Hearing Examiner expressly deletes the Proposed Order set forth in the November 14, 1986 Proposal for Decision, and sets forth a new Proposed Order in this matter.

AMENDED FINDINGS OF FACT

The Hearing Examiner hereby expressly adopts the Findings of Fact set forth in the November 14, 1986 Proposal for Decision, and makes the following additional Findings of Fact:

22. The Applicants in this matter were granted an Interim Permit (issued January 15, 1987) for a period of two irrigation seasons in order to grant them a chance to drill their well and take water availability measurements, since the testimony and reports at the hearing indicated that there might not be a productive aquifer at the Applicants' proposed point of diversion, and since the sole means by which the Applicants could satisfy the burden of proof on the issue of water availability was to present data developed through testing of their proposed well.

However, the Applicants did not drill their proposed well, and consequently have not collected the required data. Therefore, there is no data for the record which indicates that the Applicants are able to obtain water at their proposed place of diversion, or in what amount.

AMENDED CONCLUSIONS OF LAW

The Hearing Examiner hereby expressly adopts and incorporates Conclusions of Law 1 through 4 and 6 through 9, as set forth in the November 14, 1986 Proposal for Decision, amends Conclusions of Law 5 and 10, and deletes Conclusions of Law 11, 12, and 13 as follows:

5. Proposed Conclusion of Law 5, as contained in the November 14, 1986 Proposal for Decision, read as follows: "The Applicants have a present bona fide intent to appropriate water. See generally, Bailey v. Tintinger, 45 Mont. 154, 122 P. 575 (1912)." However, based on present information, this Conclusion is hereby amended to read: "At the time the November 14, 1986 Proposal for Decision was issued, the Applicants appeared to have bona fide intent to appropriate water. However, subsequent events, including the Applicants' failure to drill the well when granted an Interim Permit to do so and their failure to take advantage of the opportunity granted them to develop data so that they could meet their burden of proof on the relevant statutory criteria, indicate that the Applicants do not have a bona fide intent to appropriate water at the present time."

10. The Hearing Examiner hereby expressly adopts and incorporates by reference the first full paragraph of Conclusion of Law 10 as set forth in the November 14, 1986 Proposal for Decision, as well as the following portion of the second paragraph: "It is possible that there is water available at the proposed point of diversion if the Applicants' well encounters a

Belt Series Fracture system, or a 'zone of high hydraulic conductivity' in local alluvial material. (See Shapley Report, page 3.) However, the sole means by which the Applicant can satisfy the burden of proof on this issue is to drill the proposed well."

The remainder of Conclusion of Law 10 hereby is deleted and the following language is substituted: "Since the Applicants did not drill their well when granted an Interim Permit to do so, no data has been presented to show that there is unappropriated water in the source of supply at times when the water can be put to use by the Applicants, in the amount the Applicants seek to appropriate, and that the requested amount is available throughout the period during which the Applicants seek to appropriate. Applicants have failed to provide substantial credible evidence on the issue of water availability; therefore, the statutory criterion set forth in § 85-2-311(1)(a), is not met.

11., 12., 13. Conclusions of Law 11, 12, and 13 as set forth in the November 14, 1986 Proposal for Decision dealt with the issuance of an Interim Permit in this matter and therefore are irrelevant to the Proposed Order in the present amended Proposal for Decision. They are hereby deleted.

11. The Hearing Examiner hereby makes the additional Conclusion of Law set forth below:

"The Applicants have indicated that they may wish to drill a well some time in the future and suggest that the Hearing

Examiner extend their Interim Permit. (December 10, 1988 letter to Hearing Examiner from Lloyd A. Twite.) However, since the Applicants are not installing a well or proceeding with perfecting their Permit at the present time, and have not proceeded with due diligence to utilize their Interim Permit, there is no basis for granting an extension of time on the Interim Permit.

However, since the decision on the underlying Application is being made on the basis of a failure of proof by the Applicants at the present time, rather than an affirmative conclusion that the criteria cannot be met, the Application will be denied without prejudice so that the Applicants may reapply for a beneficial water use permit at such time as they are ready to proceed with their proposed project."

THEREFORE, based upon the Findings of Fact and the amended Conclusions of Law in this matter, and upon all files and records herein, the Hearing Examiner makes the following:

PROPOSED ORDER

Application for Beneficial Water Use Permit No. 57517-g76L by Lloyd A. and Mary C. Twite hereby is denied without prejudice.

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a

petition in the appropriate court within 30 days after service of the Final Order.

Dated this 20th day of January, 1989.

Peggy A. Elting
Peggy A. Elting, Hearing Examiner
Department of Natural Resources
and Conservation
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6612

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Amended Proposal for Decision was duly served upon all parties of record at their address or addresses this 20th day of January, 1989, as follows:

Lloyd A. & Mary C. Twite
3000 Eldora
Missoula, Montana 59803

Leon Perrin
Route 3, Box 395
Hot Springs, Montana 59845

Lando R. Bras
P.O. Box 3
Lonepine, Montana 59848

Douglas and Diane Page
Route 2
Hot Springs, Montana 59845

John D. Malinak
Route 3
Hot Springs, Montana 59845

Leonard Kaufman
Murray, Kaufman, Vidal
and Gordon, P.C.
P.O. Box 728
Kalispell, Montana 59903

Clayton and Gail White
Route 3, Box 399
Hot Springs, Montana 59845

Bill Christensen
P.O. Box 640
Hot Springs, Montana 59845

Daniel & Cheryl Jackson
Rt 2
Hot Springs, Montana 59845

Clayton Matt
Water Administrator,
Confederated Salish,
& Kootenai Tribes
Box 278
Pablo, Montana 59855

John O. Sederstrom
Rt. 2
Hot Springs, Montana 59845

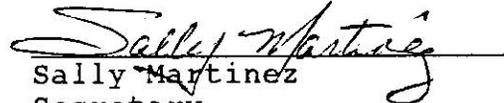
Ethel M. Harnett
P.O. Box 52
Lonepine, Montana 59848

C. O. Bras
Lonepine, Montana 59848

Chuck Brasen, Manager
Water Rights Bureau
Field Office
Kalispell, Montana
(inter-departmental mail)

Donald L. Perrin
Rt. 3 Box 467
Hot Springs, Montana 59845

Mark Shapley
Hydrogeologist, DNRC
(inter-departmental mail)


Sally Martinez
Secretary

Color

BEFORE THE DEPARTMENT
OF NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) PROPOSAL FOR DECISION
NO. 57517-G76L BY LLOYD A. AND)
MARY C. TWITE)

* * * * *

Pursuant to the Montana Water Use Act (MCA Title 85, Chapter 2) and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was held in the above-entitled matter on March 13, 1986, in Plains, Montana.

Lloyd and Mary Twite, the Applicants in this matter, appeared by and through Lloyd Twite, referred to herein as "the Applicant".

Objector Lando R. Bras, appeared at the hearing by and through his wife, Donna Bras.

Objectors Douglas and Diane Page appeared by and through Douglas Page.

Objector John Malinak appeared personally and by and through counsel Leonard Kaufman.

Objectors Clayton and Gail White appeared by and through Clayton White and counsel Leonard Kaufman.

Objector Bill Christensen appeared personally and by and through counsel Leonard Kaufman.

Objector Leon Perrin appeared personally.

Tom Smith, general manager of Liberty Drilling in Kalispell, appeared as a witness for the Applicants.

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Mark Shapley, staff hydrogeologist for the Department of Natural Resources and Conservation (hereafter, the "Department") appeared as staff expert witness for the Department, as did Charles Brasen, Field Manager of the Kalispell Water Rights Bureau Field Office.

Joseph J. Donovan, hydrogeologist, appeared at the hearing in this matter to answer questions. Mr. Donovan made a study of the geothermal and geohydrology resources of the Little Bitterroot Valley, which is the area of the proposed appropriation. (See Preliminary Matters, below.)

Objectors Donald L. Perrin, Ethel M. Harnett, Daniel and Cheryl Jackson, John Soderstrom, C.O. Bras and Lando Bras did not appear at the hearing in person or by representation. Objector Confederated Salish and Kootenai Tribes waived the right to attend the hearing, asking that their legal objections to issuance of a permit be made part of the record. (December 28, 1984 letter to the Department from Clayton Matt, Water Administrator for the Confederated Salish and Kootenai Tribes.)

STATEMENT OF THE CASE

On August 24, 1984, the Applicants filed Application for Beneficial Water Use Permit 57517-g76L, requesting 2,400 gallons per minute ("gpm") up to 1,425 acre-feet of water per year from the groundwater source, for new sprinkler irrigation of 570 acres of land. The water was to be diverted by means of three groundwater wells, one located in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 20,

and one in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 18; in Township 23 North, Range 23 West, Lake County, and the third in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 19, Township 23 North, Range 23 West, Sanders County, Montana.

Water was to be withdrawn by means of pumps for use on 110 acres in the SW $\frac{1}{4}$ of Section 17, 60 acres in the S $\frac{1}{2}$ SE $\frac{1}{4}$ of Section 18, 160 acres in the NW $\frac{1}{4}$ of Section 20, 160 acres in the NE $\frac{1}{4}$ of Section 19, and 80 acres in the N $\frac{1}{2}$ NW $\frac{1}{4}$ of Section 19, all in Township 23 North, Range 23 West, Lake and Sanders Counties, Montana. The requested period of appropriation is April 1 to October 15, inclusive, of each year.

The pertinent portions of the Application were published in the Flathead Courier, a newspaper of general circulation in the area of the source, on December 20 and December 27, 1984.

Twelve timely objections were filed to the Application.

John Soderstrom objected on the basis that the proposed appropriation would adversely affect the flow of his spring.

The Confederated Salish and Kootenai Tribes objected to the Application on the basis that the Department does not have the jurisdiction to permit the use of waters from within the Flathead Indian Reservation.

All of the non-tribal Objectors to the Application expressed concern that the Applicants' proposed pumping could lower the groundwater aquifer to the point where their wells might be affected. Objectors Christensen, White, Malinak, and Bras additionally alleged that they are utilizing artesian wells which are too small in diameter to allow pumps to be installed; therefore, if the aquifer is drawn down to the point where they

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cannot utilize the free flow of these wells, new wells would have to be drilled, pumps installed, and electricity hooked up. Estimates on having the wells replaced ranged from approximately \$116,500 (Malinak) up to \$165,000 (Christensen).

John Malinak additionally alleged that the aquifer currently is being utilized to its full potential.

Objectors C.O. Bras and Leon Perrin also noted in their Objections the existence of a large diameter well installed by the Flathead Irrigation Project (in the 1940's), which had to be shut down almost immediately because it allegedly had severe impacts on the surrounding wells for many miles.

Mark Shapley, hydrogeologist for the Department, developed a report, entitled "Analysis of Lloyd Twite's Application for Three New Irrigation Wells, Little Bitterroot River Valley, Sanders and Lake Counties (Application No. 57517)", which was sent to all parties of record. The report concluded, in part, that "The large well yields requested in this application probably cannot be obtained at the proposed points of diversion", but that if the Applicants were able to obtain the requested flows, their pumping probably would "produce substantial drawdown effects in some of the objectors' wells, and would result in decreased discharges from several existing flowing wells". (Report, page 6.)

On the basis of Mr. Shapley's report, the Applicant notified the Department that he intended to amend the Application downward to appropriate 250 gallons per minute from one well, rather than 2,400 gpm from three wells. (February 25, 1986 memorandum by

Chuck Brasen; Appendix to November 13, 1985 Hydrogeology Report by Mark Shapley; March 3, 1986 letter from Hearing Examiner to all parties.)

The hearing in this matter was completed on March 13, 1986, and the record was closed to any further testimony at the end of the hearing. However, the record was left open for the limited purpose of accepting Joseph Donovan's report when released by the publisher. A copy of the report was mailed to the Department by the Montana Bureau of Mines and Geology on March 18, 1986, and the record in this matter was closed upon its receipt.

PRELIMINARY MATTERS

Joseph J. Donovan attended the hearing in this matter because of his hydrogeology experience with the Little Bitterroot Valley. He testified that he had made a comprehensive groundwater study of the Little Bitterroot Valley when he worked for the Montana Bureau of Mines and Geology, and the results of his study have been published as "Hydrogeology and Geothermal Resources of the Little Bitterroot Valley, Northwestern Montana". (Memoir 58, Montana Bureau of Mines and Geology, 1985.)

Mr. Donovan's presence at the hearing was not solicited by any party to this matter. Rather, Department hydrogeologist Mark Shapley notified Mr. Donovan that a hearing concerning groundwater in the Little Bitterroot Valley was to be held, and Mr. Donovan decided to attend the hearing to make his expertise available to anyone who might have questions. (Testimony of

Joseph Donovan.) Both the Applicant and the Objectors availed themselves of Mr. Donovan's presence to ask hydrogeology questions concerning the results of his tests and study in the area, and all the parties agreed to the inclusion of Mr. Donovan's report in the record in this matter.

Therefore, Mr. Donovan has been accorded the status of "independent expert witness" in this matter, and his report has been accepted by the Hearing Examiner as a Department Exhibit.

EXHIBITS

The Applicants offered one exhibit in support of their Application in this matter.

Applicants' Exhibit 1 is a composite photocopy of a map showing the area of the Little Bitterroot Valley where the Applicants' property is located. The map was marked in red by the Applicant at the hearing to show the proposed point of diversion and the approximate area of irrigation. It was also marked in blue ink by Mark Shapley to indicate the location of a USGS test well.

Applicants' Exhibit 1 was accepted for the record without objection.

The Objectors offered four exhibits in support of their Objections in this matter:

Objectors' Exhibit A is a photocopy of a computer printout captioned "Department of Natural Resources and Conservation, Water Rights System, Water Right Listing by Owner Name". The printout shows all water rights for John D. Malinak of which the Department has a record.

Objectors' Exhibit B is a photocopy of a computer printout such as the one described above, listing all water rights for Clayton H. White and Gail M. White of which the Department has a record.

Objectors' Exhibit C is a photocopy of a computer printout such as the one described above, listing all water rights for Bill P. Christensen of which the Department has a record.

Objectors' Exhibit D is a photocopy of a Notice of Completion of Groundwater Appropriation by Means of Well, showing the driller's log for a well drilled in July 1960 for Luther E. Page. The exhibit also has a photocopy of a well log report filed with the Department on a well drilled for Paul Howser, in February 1986. The third page of the exhibit is a photocopy of an aerial photograph, showing locations for the Howser well and Objector Douglas D. Page's well.

Objectors' Exhibits A, B, C and D were accepted for the record without objection.

Department Exhibit 1 is a copy of Joseph J. Donovan's report, "Hydrogeology and Geothermal Resources of the Little Bitterroot Valley, Northwestern Montana" (Memoir 58, Montana Bureau of Mines and Geology, 1985). This exhibit was offered for the record on the Hearing Examiner's own motion, and was accepted without objection.

The Department file in this matter, including the November 13, 1985 hydrogeology report prepared by Mark Shapley, was made part of the record in this matter without objection, after review by all parties at the hearing.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, does hereby make the following proposed Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

1. The Department has jurisdiction over the subject matter herein and the parties hereto, whether they appeared at the hearing or not.

2. Application for Beneficial Water Use Permit No. 57517-g76L was duly filed with the Department of Natural Resources and Conservation on August 24, 1984 at 5:45 p.m.

3. The pertinent portions of the Application were published in the Flathead Courier, a newspaper of general circulation in the area of the source, on December 20 and December 27, 1984.

4. The source of the proposed appropriation is groundwater from an aquifer variously referred to as the "Little Bitterroot gravel aquifer" (Shapley) or the "Lonepine aquifer" (Donovan). For purposes of consistency, this aquifer hereafter will be referred to as the Lonepine aquifer.

5. The use proposed by the Applicants, irrigation, is a beneficial use of water. See MCA § 85-2-102(2) (1985); Sayre v. Johnson, 33 Mont. 15, 18 P. 389 (1905).

6. The Applicants presently are requesting 250 gpm of water from a well to be located in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 20, Township 23 North, Range 23 West. (See Applicants' Exhibit 1.) The water would be pumped from the well and used to run a center pivot sprinkler system. (Testimony of Lloyd Twite.)

The requested amount of water is an amendment downward from the original Application request for 2,400 gpm from three wells, for the irrigation of 570 acres of land. The Applicant testified that he does not know how much land he will be able to irrigate with the amended request of 250 gpm; that the acreage will depend on advice from an irrigation expert as to the amount of land which can be irrigated with this flow rate. The land to be irrigated would be centered around the well, in the N½ of Section 20, Township 23 North, Range 23 West.

The Applicant testified that he wants the volume to be determined on the basis of continuous use of 250 gpm for the entire period of appropriation. He stated that the period of appropriation remains the same under his amended Application, running from April 1 through October 15 of each year.

7. The Applicant testified that he had chosen the site for his proposed well on the basis of advice from a well driller (Bill Osborne) who felt that locating the well down by Sullivan Creek might interfere with flows depended upon by other appropriators, while locating the well further up "the canyon" (Rattlesnake Gulch) would get away from the area where others would be affected.

The Applicant testified that he did not want to create any animosity, and would shut down his well if it affected any of the senior water users.

8. Tom Smith, general manager of Liberty Drilling Company, testified that he encouraged the Applicants to move the proposed point of diversion east from the highway, to minimize the impact it might have on other wells. He stated that he thinks there may still be some interference, based on Mark Shapley's report and on

the history of mutual well interference in the area. He added that his personal opinion is that there hasn't been enough testing and information to know what will happen.

9. Mr. Smith testified that the Applicants' well will probably need to be 10 inches in diameter, in order to accommodate a pump capable of providing 250 gpm. He estimated that the depth of the well would be in the 200' to 350' range, unless bedrock is encountered, based on two high capacity wells which Liberty Drilling has drilled in the area.

Mr. Smith stated that he did not know of his own personal knowledge whether there are unappropriated waters available, but that his personal opinion is that moving the site of the Applicants' proposed well to the east puts the well into a different area of recharge than that for the Little Bitterroot.

10. Leonard (Lee) Kaufman, counsel for several of the Objectors, stated his clients' position in this matter is that the entire area of the Little Bitterroot Valley is served by the same aquifer, that any use of this aquifer has the potential for affecting all the users, that the whole hydrologic system is very fragile, and that there is not enough data available to be able to project the potential effects of the Applicants' proposed well.

Mr. Kaufman stated that his clients are dependent upon artesian flow, and do not believe any further appropriations from the aquifer should be granted; that if a permit was to be granted in this matter, it should be conditioned to require metering devices and record-keeping, and should be subject to "immediate cessation" of the use should the senior water rights be affected.

Mr. Kaufman further stated that it is his clients' position that the Department should consider designating the Little Bitterroot as a controlled groundwater area, pursuant to MCA § 85-2-506 (1985).

11. Objector John Malinak testified that he owns a ranch to the south of the Applicants in the Little Bitterroot Valley. (He estimated the distance from the Applicants' proposed point of diversion to his place to be about 12 miles, while the Applicant estimated it to be about 18 to 20 miles; a review of the maps suggests that the distance is approximately 15 or 16 miles.)

Mr. Malinak testified that he flood irrigates about 100 acres of land with three artesian wells, and uses the wells for stockwater. He stated that the wells are kept flowing all year for stockwatering but are "valved down" unless he is irrigating. At peak flow, the wells flow about 1,000 to 1,200 gpm from the well which has a 7" diameter pipe, and up to 1,000 gpm from the 6" diameter wells. He stated that the flow from these wells historically drops from a "full pipe" in April to about half flow in August, as the result of drawdown during the irrigation season, but that the drawdown has worsened in the last couple of years, to the point where the flow from his wells was not sufficient to fully irrigate the lands he previously has irrigated from the wells.

12. Mr. Malinak testified that neither he nor any of the other groundwater appropriators have ever pumped from the aquifer, but have depended upon artesian flow. He estimated that it would cost him \$70,000 to retrofit his wells with casing,

pumps, and electricity if the Applicants' proposed diversion should reduce or eliminate the artesian flow.

Mr. Malinak stated that he contacted a geohydrologist, Mark Spratt, who indicated that there was not enough hydrogeology data available, pending Joseph Donovan's report, to be able to tell whether the Applicants' proposed well would affect Mr. Malinak. Mr. Malinak testified that if his wells were affected, that it would put him out of business, since he cannot afford the costs of retrofitting his wells.

In response to a question from Chuck Brasen, Mr. Malinak testified that he believes there are some unvalved, uncontrolled wells in the valley which flow during the winter.

13. Objector Clayton White testified that he has two artesian wells which are located about 18 to 20 miles away from the Applicants' proposed point of diversion. The wells are valved, and are used for domestic purposes and for some irrigation.

Mr. White testified that his main concern is to maintain artesian flow from the aquifer, since many of the older wells in the valley are too small in diameter to be fitted with a pump (Mr. White's wells have a 4" diameter), and the projected costs of replacing the two White wells is \$125,000.

Mr. White stated that he would like to see the Little Bitterroot Valley closed to additional appropriations, and a ban put on pumping. He stated that the wells in the valley have an impact on each other; that his own wells affect each other "a lot," and that one of his wells stops flowing when a neighbor opens up his 6" diameter wells about one to one-and-a-quarter miles away. He added that the aquifer has a lot of difference in pressure between the spring and fall.

Mr. White added that he is aware of at least one free-flowing well in the valley.

14. Objector Bill Christensen testified that he is located about 15 to 17 miles south-southwest of the Applicants and that he has ten artesian wells on his property. The wells are used during the winter to fill four storage reservoirs with a total capacity of about 900 acre-feet, and are used during the summer to supplement the stored water. The waters from the wells is used for irrigation, stockwater, and domestic uses.

Mr. Christensen testified that all of his wells have 4" casing, and therefore could not be retrofitted with pumps. He estimated the cost of replacing the wells would be about \$165,000.

Mr. Christensen stated that he believes the aquifer has reached the limit of appropriation, and should be closed to any more appropriations. He stated that one of his higher elevation wells presently ceases to flow in July or August, then begins to flow again a month or two later. Mr. Christensen also cited the example of a USGS test well which was drilled northwest of Lonepine in 1941, approximately 12 miles from Christensen's property and seven miles from the proposed point of diversion, which immediately affected "all of the wells" whenever it was pumped, and which had to be shut down because of its serious impact on the artesian wells in the area.

15. Objector Douglas Page testified that he has a well, used for domestic and stockwater purposes, located about 3-3/4 miles south of the Applicants' original point of diversion and slightly further from the new proposed point of diversion. His well is a pumped well, not an artesian flowing well.

Mr. Page's well is 309 feet deep (Objectors' Exhibit D), and had a static water level of 62 feet when the well was drilled in 1960. Mr. Page stated that a neighbor who drilled a well in 1986 about 1/4 mile from Page's point of diversion, and at approximately the same elevation, has a static water level of 74 feet. Mr. Page testified that this shows the static water level in the aquifer is dropping, and that the effect of the Applicants' proposed pumping will be adverse. He stated that he is concerned over the possibility that he may have to retrofit or re-drill his well.

16. Donna Bras, wife of Objector Lando Bras, testified that they have a well which is located about three miles from the Applicants' proposed point of diversion. The well, which was drilled 157 feet deep, flowed approximately 400 gpm at the time it was drilled in 1940. The well historically has been used to provide water for irrigation, domestic, and stockwater uses. A centrifugal pump was used for the irrigation and domestic purposes, while artesian flow was allowed to run over a spillway slanting up from the holding tank beneath the well housing.

Mrs. Bras testified that the artesian flow stopped in the fall of 1975, and has stopped during the fall every year since, with the flow resuming later in the fall. A jet pump was installed to provide garden, domestic and stock water, while a centrifugal pump was used from May to September to provide irrigation for 23 acres. Mrs. Bras said that the pumps ran dry in 1985 after they had irrigated the 23 acres for a total of 24 days in May, and later the water turned sandy in mid-July, apparently from inside the well. PVC casing was inserted into

the well to within 20 feet of the original depth, then a submersible pump was installed.

Mrs. Bras and her father, Bill Christensen, said that they are not sure what happened to the well, but that the Bras cannot afford to lose their source of water, and cannot afford to re-drill their well. She stated that they are already at a point where they cannot irrigate, and where water cannot be used for stockwater and domestic uses at the same time. She testified that they want to have a secure source of water.

Mrs. Bras testified that she is concerned that the Applicants' proposed pumping will lower the aquifer enough to permanently shut off the Bras well.

17. Joseph J. Donovan made a comprehensive groundwater study of the Little Bitterroot Valley, performing field work from 1978 to 1983, and publishing the results of his study in a report entitled "Hydrogeology and Geothermal Resources of the Little Bitterroot Valley, Northwestern Montana". (See Preliminary Matters.) Mr. Donovan testified that his basic data was obtained through monitoring 25 wells between July 1979 and March 1982, with continuous monitoring of six wells.

Mr. Donovan stated that the aquifer in the Little Bitterroot Valley, which he has named the "Lonepine" aquifer, is a productive aquifer with a tremendous capacity. He characterized the aquifer in the north part of the valley as being a "big bathtub" full of water; permeable, extremely transmissive, and having very little gradient. Mr. Donovan stated that the aquifer becomes less permeable to the south, where the valley narrows.

Mr. Donovan testified that interpretations which may be made "unambiguously" on the basis of the data are that the Lonestone aquifer is basically continuous throughout the valley, and that the aquifer is under confined, artesian conditions throughout much of the valley. Mr. Donovan defined "artesian" to mean that water rises to a height above the level of the top of the aquifer, although it may or may not free flow at the land surface, depending upon the surface elevation. Wells below the piezometric (pressure) elevation of about 2,780 feet in the north part of the valley, and 2,750 feet to the south, will free flow.

18. Mr. Donovan testified that the Lonestone aquifer appears to recharge at a steady rate. He stated that his personal speculations lead him to believe that the sources of recharge for the aquifer are geothermal water from below, groundwater from tributary valleys, recharge coming down through the Niarada-Bitterroot Flat area, and that probably a lot of recharge is from seasonal flooding of the Little Bitterroot River.

Mr. Donovan stated that the drawdowns observed, and testified to, by the parties are almost exclusively due to irrigation pumping and flowing, which results in a seasonal drawdown of 10 to 20 feet in the summer because of the increased demands on the aquifer. Anywhere from 70 to 130 percent of a summer's depletion is recovered prior to the next irrigation season. Mr. Donovan stated that the problem is not dewatering of the aquifer, since the aquifer has a "tremendous" capacity, but rather is bleeding off of the artesian pressure in the aquifer system. In addition, the aquifer's high transmissivity causes mutual well interference, with the possibility of the effects caused by one well being experienced as much as 18 miles away.

Mr. Donovan stated that three steps can be taken to reduce the fragility of the water use situation in the Valley; conservation of water through reducing waste (he estimated that 300 to 400 acre-feet per year is lost through uncontrolled wells), maximizing the recharge to the aquifer, and organizing the water users to mutually cooperate. He added that the sustained yield of the aquifer probably wouldn't be greatly higher than it is now if the users wish to maintain flowing wells. However, if loss of artesian flow may be accepted, the Lonepine aquifers potential sustained yield probably is greatly higher than its present yield: the aquifer has from 200 feet to 250 feet of available drawdown, depending upon the location.

19. Mr. Donovan stated that it is his opinion that if the Applicants find water at the proposed point of diversion, the water will come from a tributary aquifer rather than the Lonepine aquifer. A well in a tributary aquifer could reduce recharge to the Lonepine aquifer over a long period of time, but the tributary aquifers may or may not have enough of a "stream" that they continue supplying the Lonepine aquifer during seasonal drawdown, and they are not a main source of recharge.

Mr. Donovan stated that any reduction in recharge to the Lonepine aquifer would not create a problem, since the problem is loss of pressure rather than lack of water. Additionally, well interference probably would not occur if the well is put into a tributary aquifer, since interference comes from wells in the same aquifer under confined conditions. Permeability is "much less" in the tributary aquifers, and the zone of influence of the Applicants' pumping probably would be limited.

Mr. Donovan testified that there is no shallow aquifer in the area of the Applicants' proposed point of diversion, at least as far as can be told from a USGS well which was drilled nearby.

20. Mr. Shapley's November 13, 1985 hydrogeology report on the Application reached two main conclusions; that the high well yields requested in the original Application probably could not be obtained at the proposed points of diversion, and that if such yields were produced, they most likely would be the result of encountering the Lonestone aquifer or a fracture system in close hydrologic connection with the aquifer. "Either possibility would probably produce substantial drawdown effects in some of the Objectors' wells, and would result in decreased discharges from several existing flowing wells". (Shapley Report, page 6.)

On the basis on the Applicants' revision of the Application downward to one 250 gpm well, Mr. Shapley recalculated the projected drawdown effects of the proposed well, resulting in a much-reduced projected drawdown. Mr. Shapley also noted that "the prospects of obtaining well yields of 250 gpm from aquifers hydrologically isolated from the Little Bitterroot confined system (such as Belt Series fracture systems) are somewhat better than for the larger yields." (See Shapley Report, Appendix and Figures 5 and 6.)

At the hearing, Mark Shapley testified that the log for the USGS well which was drilled approximately 1/2 to 3/4 mile west of the proposed point of diversion (see Applicants' Exhibit 1) suggests that there is no productive aquifer at the Applicants' proposed point of diversion. The USGS well was drilled to a depth of 550 feet without encountering very much water. Mr.

Shapley stated that, if water is present at the proposed well site, the source probably would be located in sedimentation from Rattlesnake Creek rather than in the Lonepine aquifer.

21. Mr. Shapley testified that flow data from the Applicants' well would be useful for purposes of providing additional information about the valley's hydrogeology, but would not be particularly helpful in determining what interference, if any, the Applicants' well might be causing to other wells. Such a determination would require monitoring of other wells, as well as pre-irrigation season testing, since it would be "virtually impossible" to sort out the effect of the Applicants' well during the season with so many other possible sources of interference being utilized.

Based upon the foregoing Findings of Fact and upon the record in this matter, the Hearing Examiner makes the following:

PROPOSED CONCLUSIONS OF LAW

1. The Department gave proper notice of the hearing, and all relevant substantive and procedural requirements of law or rule have been fulfilled, therefore the matter was properly before the Hearing Examiner.

2. The Department has jurisdiction over the subject matter herein, and all the parties hereto.

3. Those parties who failed to appear at the hearing in this matter, either in person or by representation, are in default.

Administrative Rule of Montana 36.12.208.

4. The Department must issue a Beneficial Water Use Permit if the Applicant proves by substantial credible evidence that the following criteria are met:

- (a) there are unappropriated waters in the source of supply:
 - (i) at times when the water can be put to the use proposed by the applicant,
 - (ii) in the amount the applicant seeks to appropriate; and
 - (iii) throughout the period during which the applicant seeks to appropriate the amount requested is available;
- (b) the water rights of a prior appropriator will not be adversely affected;
- (c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;
- (d) the proposed use of water is a beneficial use;
- (e) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved.

5. The Applicants have a present bona fide intent to appropriate water. See generally, Bailey v. Tintinger, 45 Mont. 154, 122 P. 575 (1912).

6. The use proposed by the Applicants, irrigation, is a beneficial use of water. See MCA § 85-2-102(2) (1985); Sayre v. Johnson, 33 Mont. 15, 18 P. 389 (1905).

7. The proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved.

8. The proposed means of diversion, construction, and operation of the appropriation works are adequate. (See Finding of Fact 6.)

9. The record in this matter provides substantial, credible evidence that the Applicants' proposed appropriation will not adversely affect other appropriators. The Applicants have located their proposed point of diversion in an area where they were advised effects upon other wells will be minimized, if not completely eliminated. (See Findings of Fact 7, 9.)

The evidence in the record bears out the likelihood that the area of the Applicants' proposed well location has little, if any, hydrological connection to the Lonepine aquifer which is the source for all of the Objectors' wells. Rather, the likely source of any water which the Applicants may encounter at the proposed point of diversion would be from a tributary aquifer. (See Findings of Fact 19 and 20.)

The Applicants' proposed appropriation might result in some small loss of recharge to the Lonepine aquifer over a long period of time. (See Finding of Fact 19.) However, the record in this matter indicates that this loss would have a de minimus effect on the Objectors, since the tributary aquifers apparently are not a major source of recharge, and since the Lonepine aquifer has tremendous quantities of water. (See Finding of Fact 18.)

Mr. Donovan's testimony indicates that the drawdown problems which the Objectors have been experiencing are the result of loss of pressure in the aquifer, rather than loss of water. He estimated that the aquifer has from 200 feet to 250 feet of available drawdown. However, heavy uses during the irrigation season cause a loss of pressure in the aquifer, resulting in reduction or loss of artesian flow. (See Finding of Fact 18.)

Setting aside the question of whether the Objectors are entitled to protection of their artesian flows¹, the testimony and evidence indicates that pumping at the Applicants' proposed point of diversion should not adversely affect the Objectors' ability to obtain artesian flows. It is likely that there is no strong hydrological connection between the Rattlesnake Creek point of diversion and the Lonepine aquifer, and the permeability of the tributary aquifer is much lower, which would limit the well's "zone of influence." (See Findings of Fact 18, 19, and 20; November 13, 1985 Report by Mark Shapley.)

In summary, there is substantial, credible evidence that the Applicants' well will not adversely affect the Objectors' wells, either by reducing the amount of water available in the aquifer, or by reducing the pressure which provides the Objectors with artesian flow by any measurable amount.

¹ As Mr. Donovan's testimony indicates, the Lonepine aquifer's sustained yield potentially is greatly higher, but the present users would not be able to maintain flowing (non-pumped) wells if there is any large increase in usage from the aquifer. The Department previously has held that appropriators are not entitled to continue depending upon artesian flow as their means of diversion if they can reasonably exercise their water rights under the changed conditions. (See In the Matter of the Application for Beneficial Water Use Permit No. 41441-g41R by Jim McAllister, (June 19, 1985 Proposal for Decision), In the Matter of the Application for Beneficial Water Use Permit No. 42666-g41F by Richard MacMillan, (March 31, 1986 Final Order). See also MCA § 85-2-401(1) (1985) which states in part, "Priority of appropriation does not include the right to prevent changes by later appropriators in the condition of water occurrence, such as . . . the lowering of a water table, artesian pressure, or water level, if the prior appropriator can reasonably exercise his water right under the changed conditions."

This determination is made on the basis of many factors, including the balancing of the cost to senior appropriators as against the value of the water made available for appropriation, and the reasonableness of the senior users' means of diversion. However, these issues are not reached in the present matter, since the record indicates that the Applicants' proposed appropriation will not affect the Objectors.

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10. It is impossible to ascertain from the record in this matter whether there are unappropriated waters in the source of supply, at times when the water can be put to the use proposed by the Applicants, in the amounts they seek to appropriate, and that throughout the period during which the Applicants seek to appropriate, the amount requested is available. The testimony and reports indicate that there may not be a productive aquifer at the Applicants' proposed point of diversion, based on the USGS well which was drilled within a mile of the proposed point of diversion. (See Findings of Fact 19 and 20; November 13, 1985 Report by Mark Shapley.)

It is possible that there is water available at the proposed point of diversion if the Applicants' well encounters a Belt Series Fracture system, or a "zone of high hydraulic conductivity" in local alluvial material. (See Shapley Report, page 3.) However, the sole means by which the Applicants can satisfy the burden of proof on this issue is to drill the proposed well. Since the Applicants have met the burden of proof on the other statutory criteria, and since it is possible that the remaining criteria can be met for some amount of appropriation (albeit possibly not for the full flow rate requested), the Hearing Examiner believes that the Applicants should be given an Interim Permit for testing purposes, so that they have a chance to develop the proof.

As the result of Joseph Donovan's study of groundwater in the Little Bitterroot Valley, more hydrogeologic information is available on the area than exists for most groundwater sources in

Montana. Even so, the current "state of the art" in groundwater hydrology dictates that much is still unknown, especially about drainages (such as Rattlesnake Creek) which are not part of the Lonepine aquifer proper. (See testimony and reports of Joseph Donovan and Mark Shapley.) A requirement that an applicant for a groundwater permit must be able to present accurate and comprehensive hydrological information on the aquifer he proposes to tap would effectively forestall most appropriations of groundwater. Such a result is not consistent with the maximization of the use of state waters which it is the policy of the Montana Water Use Act to encourage. See MCA § 85-1-101(3) (1985).

In addition, the hydrogeologic information which is available in this matter indicates that there is not much probability that whatever pumping the Applicants may be able to do will adversely affect any senior appropriators. Under such circumstances, it seems equitable to allow the Applicants an opportunity to develop information on the issue of water availability.

11. Administrative Rule of Montana 36.12.104 states:

(1) Pending final approval or denial of an application for a regular permit, the department may, in its discretion and upon proper application, issue an interim permit authorizing an applicant to begin appropriating water immediately.

(a) The department may not issue an interim permit unless there is substantial evidence that the criteria for issuing a regular permit under section 85-2-311, MCA, will be met.

(b) An interim permit may be issued subject to any terms and conditions the department considers necessary to protect the rights of prior appropriators.

(2) An interim permit is subject to revocation by the department in accordance with section 85-2-314, MCA.

(3) The issuance of an interim permit does not entitle an applicant to a regular permit, and approval of the application for a regular permit is subject to the procedures and criteria set out in the act.

(4) A person may not obtain any vested right to an appropriation obtained under an interim permit by virtue of the construction of diversion works, purchase of equipment to apply water, planting of crops, or other action where the regular permit is denied or is modified from the terms of the interim permit.

12. The § 85-2-311 criteria have been met in this matter, apart from the requirement that the Applicants prove that water is available for their proposed appropriation. However, there is evidence to indicate that the Applicants may be able to meet this criterion if given an opportunity to drill their well.

The grant of an Interim Permit should not act as a detriment to the Objectors, since the record indicates that their wells in all likelihood will not be affected, and since approval of a permanent permit is not automatic.

13. The issuance of an Interim Permit does not automatically entitle the Applicant to a Provisional ("permanent") Permit.

To be entitled to a Provisional Permit, the Applicants are still required to provide substantial credible evidence on the issue of water availability. In addition, if the effect of the Applicants' testing reaches the Lonepine aquifer, and hence may have the potential of affecting the Objectors' wells, further testing will be required prior to issuance of a Provisional Permit to ensure that no adverse affect will result.

WHEREFORE, based upon the proposed Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

PROPOSED ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, an Interim Permit hereby is granted to Lloyd A. and Mary C. Twite to drill a well in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 20, Township 23 North, Range 23 West, Lake County, Montana. Providing that the Permit limitations are met, during the test period Mr. and Mrs. Twite may appropriate 250 gpm up to 217.65 acre-feet of groundwater per year for the sprinkler irrigation of property in the N $\frac{1}{2}$ of Section 20, Township 23 North, Range 23 West, Lake County, Montana. The period of such use shall be April 1 to October 15, inclusive.

The Interim Permit is limited to the well specified and discussed in this matter, and shall not be seen as authorization to drill any other well, or at any other location, either in an attempt to locate water or to locate enough water to fill the 250 gpm maximum flow rate. Any Provisional Permit which may be issued in this matter will be modified, if necessary, to reflect whatever actual flow rate has been obtained at the authorized well, and will specify a volume based on the actual flow rate and upon the amount of water necessary to meet crop requirements for the acreage which can be irrigated with the flow rate. At such time as a Provisional Permit may be issued in this matter, the Applicants will be required to specify the acreage and location of their place of use.

This Permit is issued subject to the following express terms, conditions, restrictions, and limitations:

A. The Permittees shall install a flow meter on their well, capable of measuring the amounts and times of pumping. The Permittees shall keep a written record of the flow rate and volume of all waters withdrawn, including the times of pumping, and shall make these records available to the Department upon request.

B. The Permittees shall cease pumping immediately upon notification by the Department that it has received a complaint by a prior appropriator alleging that the Permittees' pumping is affecting the prior appropriator's well to the extent that the senior water rights cannot reasonably be exercised.

In such an event, the Permittees shall contact one of the Department hydrogeologists concerning the need for testing in regard to adverse affect to other wells, and shall make any reasonable aquifer tests that the hydrogeologist deems are necessary. Such testing may necessitate pre-irrigation season testing and/or monitoring of other wells, and must be paid for by the Permittees.

C. This Interim Permit is subject to all prior and existing rights, and to any final determination of such rights as provided by Montana Law. Nothing herein shall be construed to authorize appropriations by the Permittee to the detriment of any senior appropriator.

D. This Permit is subject to all prior Indian reserved water rights of the Confederated Salish and Kootenai Tribes, if any, in the source of supply.

E. This Interim Permit is subject to MCA § 85-2-505, which requires that all wells be so constructed and maintained as to prevent wasting water or contamination of other water sources, and that all flowing wells be capped or equipped with valves so that the flow of water can be stopped when the water is not being put to beneficial use.

F. The issuance of this Interim Permit by the Department shall not reduce the Permittee's liability for damages caused by the exercise of this Permit, nor does the Department, in issuing this Permit, acknowledge any liability for damages caused by the exercise of this Permit, even if such damage is a necessary and unavoidable consequence of the same.

G. This Permit shall be valid through October 15, 1988, for purposes of allowing the Permittees to drill a well and determine the water availability at their point of diversion, and to determine the effects of the Permittees' pumping on prior appropriators, should it become necessary.

Subsequent to the expiration of the Interim Permit in this matter, the Department will issue a Final Order granting the Permittees a Provisional Permit, unless the test data indicates that the criterion of water availability cannot be met. If water is available, but not in the amount requested, the Provisional Permit will be modified to reflect the actual flow rate and volume.

In the event that testing indicates a senior appropriator's water rights may be adversely affected, no Provisional Permit will be issued until the parties have been given the opportunity to present evidence and argument on the issue of adverse affect.

Any Provisional Permit which is issued may be conditioned to mitigate possible adverse affects to prior appropriators.

H. Failure to obey the conditions of this Interim Permit will result in action by the Department to modify or revoke the Permit.

NOTICE

This proposal is a recommendation, not a final decision. All parties are urged to review carefully the terms of the proposed Interim Permit, including the legal land descriptions. Any party adversely affected by the Proposal for Decision may file exceptions thereto with the Hearing Examiner (1520 E. 6th Ave., Helena, MT 59620-2301); the exceptions must be filed within 20 days after the proposal is served upon the party. MCA § 2-4-623.

Exceptions must specifically set forth the precise portions of the proposed decision to which exception is taken, the reason for the exception, and authorities upon which the exception relies. No final decision shall be made until after the expiration of the time period for filing exceptions, and the due consideration of any exceptions which have been timely filed. Any adversely affected party has the right to present briefs and oral arguments before the Water Resources Administrator, but these requests must be made in writing within 20 days after service of the proposal upon the party. MCA § 2-4-621(1). Oral arguments held pursuant to such a request will be scheduled for the locale where the contested case hearing in this matter was held, unless the party asking for oral argument requests a different location at the time the exception is filed.

Parties who request oral argument are not entitled to present evidence that was not presented at the original contested case hearing: no party may give additional testimony, offer additional exhibits, or introduce new witnesses. Rather, the parties will be limited to discussion of the information which already is present in the record.

DONE this 14th day of November, 1986.

Peggy A. Elting
Peggy A. Elting, Hearing Examiner
Department of Natural Resources
and Conservation
1520 E. 6th Avenue
Helena, Montana 59620-2301
(406) 444 - 6612

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STATE OF MONTANA)
) ss.
County of Lewis & Clark)

On this 14 day of November, 1986, before me, a Notary Public in and for said state, personally appeared DONNA ELSER, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.



Notary Public for the State of Montana
Residing at Helena, Montana
My Commission expires 1-21-1987

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